Low Chee & Sons Sdn Bhd & Anor v Extreme System Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM)(NCC)-1090 OF 2010 AND W-02(IM)(NCC)-1190 OF 2010
ZAINUN ALI, RAMLY ALI AND ZAHARAH IBRAHIM JJCA
5 MAY 2011

Civil Procedure — Suitability of O 14A of the Rules of the High Court 1980 — Necessity of a full trial — Whether O 14A could be invoked on basis of assumed facts — Whether procedure only appropriate if all material facts undisputed or admitted and determination of legal questions disposed of whole action

The respondent in the appeals herein had brought an action in the High Court to, inter alia, declare that all the defendants named in the action (apart from the first defendant) had acted in concert to control the first defendant company ('Ho Hup') and had breached the Code on Take-overs and Mergers 1998 ('the Code') and the Securities Commission Act 1993 ('SCA') in failing to make a mandatory general offer of Ho Hup's shares. The respondent sought damages for breach of the Code and the SCA. It had also attempted, but failed, to obtain an injunction to prevent an extraordinary general meeting of Ho Hup from being convened. The second to the eighth defendants in the action (the appellants in the appeals herein) applied to the High Court under O 14A of the Rules of the High Court 1980 to seek its determination on three questions of law to summarily dispose of the action. The three questions essentially concerned whether the respondent had a private law cause of action and locus standi to maintain the action. Despite the respondent arguing that the O 14A procedure was inappropriate as the facts were in dispute, the High Court ruled the facts pleaded in the statement of claim could be assumed to be true and determined the questions in favour of the respondent. Dissatisfied with that decision, the defendants filed the instant appeal to the Court of Appeal.

Held, allowing the appeal with no order as to costs, setting aside the High Court's decision and remitting the case back to the High Court for full trial of the action:

(1) The O 14A procedure was not suitable in the instant case as there were conflicting allegations of fact (see para 15(a)).

(2) For O 14A to be invoked all material facts relating to the subject matter of the claim must be undisputed or admitted. It could not be invoked on the basis of assumed facts as was done in this case. The court should not give a ruling under O 14A in *vacuo* or based on hypothetical facts. The

crux of the plaintiff's claim was that the defendants had acted in concert to take over Ho Hup in breach of the Code and the SCA. Those factual allegations were vehemently denied by the defendants (see para 15(a)).

(3) The O 14A procedure in the present case did not dispose of a substantial part of the action and therefore there was no saving in costs and time as the same evidence needed to be led with respect to the remaining causes of action ie for collateral and improper exercise of rights by shareholders and for conspiracy to injure the interests of Ho Hup. The claims for these causes of action were still good and entailed leading evidence at trial, the same evidence showing breaches of the Code and the SCA (see paras 15(c)-(d)).

[Bahasa Malaysia summary

Responden-responden dalam rayuan ini telah membawa tindakan di Mahkamah Tinggi untuk, antara lain, mengisytiharkan bahawa kesemua defendan-defendan yang dinamakan di dalam tindakan (selain daripada defendan pertama) telah bertindak bersama untuk mengawal defendan pertama ('Ho Hup') dan telah memungkiri Kod Pengambilalihan dan Penggabungan 1998 ('Kod') dan Akta Suruhanjaya Sekuriti 1993 ('ASS') kerana gagal untuk membuat tawaran am mandatori saham-saham Ho Hup. Responden memohon ganti rugi untuk kemungkiran Kod dan ASS tersebut. Ia juga mencuba, tetapi gagal, untuk mendapatkan injunksi untuk menghalang mesyuarat agung luar biasa Ho Hup daripada diadakan. Defendan-defendan kedua hingga kelapan di dalam tindakan (perayu-perayu dalam rayuan ini) memohon kepada Mahkamah Tinggi di bawah A 14A Kaedah-Kaedah Mahkamah Tinggi 1980 untuk mendapatkan penentuannya atas tiga soalan undang-undang untuk secara terus mendengar tindakan tersebut. Ketiga-tiga soalan pada dasarnya berkaitan sama ada responden mempunyai kausa tindakan undang-undang dan *locus standi* untuk mengekalkan tindakan. Walaupun responden berhujah bahawa prosedur A14A tidak wajar memandangkan fakta adalah dipertikaikan, Mahkamah Tinggi memerintahkan bahawa fakta yang diplidkan di dalam penyataan tuntutan boleh dianggap sebagai betul dan menentukan soalan-soalan tersebut memihak responden. Tidak berpuas hati dengan keputusan tersebut, defendan-defendan memfailkan rayuan ini kepada Mahkamah Rayuan.

Diputuskan, membenarkan rayuan tanpa perintah kepada kos, mengenepikan keputusan Mahkamah Tinggi dan meremit kes kepada Mahkamah Tinggi untuk perbicaraan penuh tindakan:

(1) Prosedur A 4A tidak sesuai dalam kes ini memandangkan terdapat dakwaan-dakwaan bercanggah terhadap fakta (lihat perenggan 15(a)).

(2) Untuk A 14A digunakan kesemua fakta material berkaitan perkara subjek tuntutan mesti tidak dipertikaikan atau dimasukkan. Ia tidak

dapat digunakan atas dasar fakta yang dianggap seperti yang dilakukan di dalam kes ini. Mahkamah tidak patut memberi perintah di bawah A 14A dalam *vacuo* atau berdasarkan atas fakta andaian. Teras utama tuntutan plaintif adalah bahawa defendan-defendan telah bertindak bersama untuk mengambil alih Ho Hup dalam kemungkiran Kod dan ASS. Dakwaan-dakwaan fakta tersebut adalah dinafikan sekeras-kerasnya oleh defendan-defendan (lihat perenggan 15(a)).

(3) Prosedur A 14A dalam kes ini tidak melepaskan sebahagian daripada tindakan tersebut oleh itu tiada penjimatan kos dan masa kerana keterangan yang sama perlu dibangkitkan berkaitan baki kausa tindakan iaitu untuk kolateral dan pelaksanaan hak yang tidak betul oleh pemegang-pemegang saham dan untuk pengkomplotan untuk memusnahkan kepentingan-kepentingan Ho Hup. Tuntutan-tuntutan untuk kausa tindakan ini adalah masih berjalan dan melibatkan keterangan utama pada perbicaraan, keterangan yang sama menunjukkan kemungkiran Kod dan ASS (lihat perenggan 15(c)–(d)).]

Notes

For a case on necessity of a full trial, see 2(4) *Mallal's Digest* (4th Ed, 2012 Reissue) para 8193.

Cases referred to

Cycle Links Co Ltd v Chevalier Construction (Hong Kong) Ltd [2007] HKCU 400 (refd)

Petroleum Nasional Bhd v Kerajaan Negeri Terengganu [2004] 1 MLJ 8, CA (refd)

Seloga Jaya Sdn Bhd v UEM Gynisys Sdn Bhd [2007] 7 MLJ 385, CA (refd)

William Singam a/l Raja Singam (suing as the Public Officer of Pertubuhan Kristian Thareethin Kudaram, Ipoh Perak) v Meeriam Rosaline a/p Edward Paul & Ors [2009] 7 MLJ 888, HC (refd)

Legislation referred to

Capital Markets and Services Act 2007 s 357
Companies Act 1965 s 153
Malaysian Code on Take-overs and Mergers 1998
Rules of the High Court 1980 O 14A, O 18 r 19
Securities Commission Act 1993 Division 2 Part IV

V Vijaya Segaran (Hemalatha Parasa Ramulu with him) (Maxwell Kenion Cowday & Jones) for the appellants.
S Suhendran (William Leong with him) (William Leong & Co) for the respondent.

Ramly Ali JCA (delivering judgment of the court):

[1] This is an appeal by the third and eighth defendants in the High Court

(the appellants before us) against the decision of the learned judicial commissioner dated 16 March 2010 which decided three questions posed in an O 14A of the Rules of the High Court application in favour of the respondent. A similar O 14A application was also made by the second and fourth to seventh defendants in Civil Appeal No W-02(IM)(NCC)1109 of 2010 which is being heard together with the present appeal.

[2] The main reliefs sought by the plaintiff/respondent by its amended statement of claim are as follows:

(a) a declaration that the EGM scheduled for 4 February 2010 or any adjournment thereof is invalid;

(b) a declaration that the second to 29th defendants are parties acting in concert in the acquisition of control of Ho Hup Construction Company Bhd (Ho Hup); and

(c) a declaration that the second to 29th Defendants have breached the Malaysian Code of Take-Overs and Mergers 1998 and the Securities Commission Act 1993 in failing to make a Mandatory General Offer for the shares of Ho Hup.

[3] On 27 January 2010 the plaintiff (in the court below) had by its summons in chambers sought an interlocutory injunction against the defendants therein (first injunction). On 3 February 2010, the learned judicial commissioner granted an order for the first injunction restraining the defendants from holding the EGM scheduled for 4 February 2010 solely on the ground of short notice of the special notice required pursuant to s 153 of the Companies Act 1965.

[4] On 11 February 2010, a second special notice was given to Ho Hup requisitioning another EGM to be held on 17 March 2010. The plaintiff then by another summons in chambers dated 5 March 2010 sought to restrain the EGM that is to be held on 17 March 2010 (second injunction) on similar terms as the first injunction.

[5] On 16 March 2010, the learned judicial commissioner dismissed the plaintiff's application for the second injunction. Consequently, the third and eighth defendants (the appellants herein), filed the O 14A application in encl 66 for the determination of the three questions of law that deal with whether such a private law cause of action exists and whether the plaintiff in the High Court has the locus to bring an action based on such breach of statutory duty for making a mandatory general offer in respect of the shares.

[6] The learned judicial commissioner held that the three questions of law were suitable to be tried by way of O 14A and gave answers to the questions in

favour of the plaintiff, essentially concluding that there is a private law cause of action for damages. The third and eighth defendants however were not satisfied with the answers given. Hence, the present appeal.

[7] The three questions that were posed for determination are as follows:

(a) whether on a true construction of the Securities Commission Act 1993 (Act 498) ('SCA'), the Securities Commission of Malaysia ('SC') is the sole party that is legally competent to take legal proceedings of any kind, whether civil or criminal, against any person who is, or may be, or is suspected of, engaging in conduct that is or may potentially be in breach of any provision contained in Division 2 of Part IV of the SCA and/or the Malaysian Code on Takeovers and Mergers 1998 ('Code'), to regulate, enjoin and/or sanction such conduct;

(b) whether on a true construction of the SCA and having regard in particular to:

(i) the detailed statutory enforcement machinery contained in Division 2 of Part IV of the SCA for enforcement of the same and/or the Code;

(ii) the existence of severe criminal penalties for breach of the SCA in Division 2 of Part IV of the SCA;

(iii) the statutory intendment and object of the SCA and, in particular, of Division 2 of Part IV of the SCA; and

(iv) the repeal of s 153 of the SCA and the non-applicability of s 357 of the Capital Markets and Services Act 2007 (Act 671) to matters falling within Division 2 of Part IV of the SCA;

then, a breach of Division 2 of Part IV of the SCA and/or the Code, is legally capable of conferring on any individual who, for the purposes of this question of law, is assumed to be harmed by such alleged breach, a civil cause of action in damages for the tort of breach of statutory duty against any individual alleged to have caused the breach or harm, as the case may be; and

(c) whether, having regard to the answers to questions (a) and (b) above, an individual plaintiff who alleges that he is harmed by conduct that is alleged to be in breach of any provision contained in Division 2 of Part IV of the SCA and/or the Code, has the locus standi to seek injunctive relief, *quia timet* or otherwise, to restrain or enjoin such conduct in civil proceedings in the High Court in Malaysia.

[8] At the High Court before the learned judicial commissioner, the learned counsel for the respondent raised a preliminary objection to the effect that an O 14A application is not appropriate in the present case on the ground that the facts were in dispute and the application would not result in any saving of costs and time. The learned judicial commissioner dismissed the said preliminary

objection finding, inter alia, that the facts in the statement of claim could be assumed to be true in the same way as application under O 18 r 19 of the RHC (see para 12 of the judgment at p 45 of appeal records Vol 1).

[9] Before us in the present appeal, learned counsel for the respondent once again raised the same preliminary objection. To the respondent, the O 14A application is only directed to the first cause of action (ie breach of Take-Over Code) but not the second and third causes of action (ie the collateral purposes and conspiracy causes of action).

[10] Since the preliminary objection was again raised before us as a preliminary issue to the present appeal, we shall first deal with it before going into the merit of the appeal proper.

[11] We observed the three causes of action pleaded in the amended statement of claim are as follows:

(a) breach of the Take-Over Code (first cause of action);

(b) collateral and improper purposes (second cause of action); and

(c) conspiracy (third cause of action).

[12] As to the first cause of action, the plaintiff contended that the defendants had acted in concert to gain control of Ho Hup by acquiring shares over the prescribed 33% in Ho Hup and have failed to make a mandatory general offer for the shares in the company, and therefore have breached the Take-Over Code and the Securities Commission Act.

[13] On the second cause of action, the plaintiff contended that all the defendants had exercised their rights under their shares not bona fide, but for collateral purposes inconsistent with the proper purposes for which such rights are conferred. The plaintiff claimed that the calling of both the EGMs by the third and eighth defendants to remove the current board of directors of the company was invalid as the EGMs were called for collateral and improper purposes to prevent the existing board from proceeding with a civil suit commenced against the first appellant (Datuk Low Tuck Chong) for breach of fiduciary duties; and to impede investigations commenced against him.

[14] With regard to the third cause of action, the plaintiff claimed that the defendants had wrongfully conspired by unlawful means to injure the interest of the plaintiff company in that they acted in concert in breach of the Take-Over Code to acquire control of Ho Hup without making a general offer; and acted to achieve the collateral purposes. The plaintiff further claimed that the conspiracy was carried out fraudulently because the acquisition of the

shares triggering the Take-Over Code was deliberately concealed from the Securities Commission, Bursa and the other shareholders of Ho Hup; and the representations made to the shareholders with respect to the resolutions proposed at the EGM were false.

[15] We are in agreement with learned counsel for the respondent, that based on the facts and circumstances of the present case O 14A application is not suitable on the following grounds:

(a) for an O 14A to be invoked, all material facts relating to the subject matter in the claim must be undisputed or admitted. The court should not give a ruling under O 14A in vacuo or based on hypothetical facts which can only be determined at full trial. The crux of the plaintiff's claim is that the defendants acted in concert to take over Ho Hup in breach of the Take-Over Code and the Securities Commission Act. These factual allegations in the amended statement of claim are vehemently denied by the defendants. Order 14A procedure cannot be invoked on the basis of assumed facts (as what has been done by the learned judicial commissioner). The O 14A procedure is not appropriate where there are conflicting allegations of fact (see: *Cycle Links Co Ltd v Chevalier Construction (Hong Kong) Ltd* [2007] HKCU 400; *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8; *Seloga Jaya Sdn Bhd v UEM Gynisys Sdn Bhd* [2007] 7 MLJ 385 and *William Singam a/l Raja Singam (suing as the Public Officer of Pertubuhan Kristian Thareethin Kudaram, Ipoh Perak) v Meeriam Rosaline a/p Edward Paul & Ors* [2009] 7 MLJ 888);

(b) the above authorities clearly indicate that there was no question of 'assuming all the facts were true for the purpose of an O 14A application'. The learned judicial commissioner should not have made a determination under O 14A based on assumed or hypothetical facts;

(c) the O 14A procedure in the present case does not dispose of a substantial part of the action and therefore there will not be any saving in costs and time. The learned judicial commissioner in his grounds of judgment accepted this principle. There will be no such saving as the same evidence will be led with respect to the remaining causes of action; and

(d) the O 14A application is to determine whether a breach of the Take-Over Code and the Securities Commission Act will give rise to an actionable breach of statutory duty for damages; but the relief sought in the plaintiff's claims includes a mandatory order to compel the defendants to make a mandatory general offer and for damages for failing to make the general offer. The other causes of action are the claims for collateral purposes and for conspiracy. Both these claims are still good and would

entail leading at trial, the same evidence showing the breaches of the Code and the Act, even if the determination of the O 14A is in favour of the respondent.

[16] On the above considerations, we are of the view that an O 14A procedure in the present case is not suitable. The matter should be sent back to the High Court for full trial for determination of all the causes of action at one go. We therefore allow the appeal to the effect that the determination by the learned judge by way of an O 14A procedure is set aside, with no order as to costs. Deposit to be refunded to the appellants.

Appeal allowed with no order as to costs, the High Court's decision set aside and case remitted back to the High Court for full trial of the action.

Reported by Ashok Kumar